IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1289

GERALD MARKER, 4365 Ventura Canyon #5, Sherman Oaks, California 91403

MARGUERITE M. SANDERS, 11277 Culver Boulevard, Culver City, California 90230

DR. ANNE PARKS, 18313 Biltmore Street, Detroit, Michigan 48235

PHYLLIS A. BROWNE, 4020 South 48th Street, Milwaukee, Wisconsin 53222

JUDITH D. BERNS, 1129 North Jackson Street, Milwaukee, Wisconsin 53202

BERNARD MCNAMARA, 6826 West 109th Street, Worth, Illinois 60482

ERNEST GABAUER, Route 1, Box 301, High Ridge, Missouri 63048

CLAUDE J. HUSKEY, 3412 Maybell Drive, St. Louis, Missouri 63121

ELBERT HILL, Box 65, Pilot Knob, Missouri 63663

VERNON I. MARDEN, 17801 N.W. 80th Avenue, Hialeah, Florida 33015

DALE RICHARDSON, 7509 State Street, Ralston, Nebraska 68527

(continued)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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BOB ELAYDO, 214 West Cecil Avenue, Delano Kern County, California

BENJAMIN L. RIGHTER, 17404 Stagg Street, Northbridge, California 91324

ORLAND O. BERGSTROM, 532-21 Mecca Avenue, Tarzana, California 91356

ALINA DUBOIS, 79 North Street, Willimantic, Connecticut 06226

JUDITH TEWKSBURY, 6 Garden Street, Middletown, Connecticut 06457

Petitioners (Intervenors),

—v.—

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA and its LOCALS 1093, 558 and 25, 8000 East Jefferson Avenue, Detroit, Michigan 48214

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS and its DISTRICT LODGE 1578, 1300 Connecticut Avenue, N.W., Washington, D.C. 20036

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES and its DISTRICT COUNCIL 77, 1155 Fifteenth Street, N.W., Washington, D.C. 20005

AMERICAN FEDERATION OF TEACHERS, and its affiliate, DETROIT FEDERATION OF TEACHERS, 1012 14th Street, N.W., Washington, D.C. 20005

AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, ASSOCIATED ACTORS AND ARTISTES OF AMERICA, AFL-CIO, 1350 Avenue of the Americas, New York, New York 10019

(continued)

UNITED FARM WORKERS NATIONAL UNION, AFL-CIO, P.O. Box 62, Keene, California

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, AFL-CIO and its LOCAL 146, 1750 New York Avenue, N.W., Washington, D.C. 20006

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO and its LOCAL 383, 905 16th Street, N.W., Washington, D.C. 20006

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, and its DISTRICT 7 and LOCAL 7495, 1925 K Street, N.W., Washington, D.C. 20006

OIL CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO and its LOCAL 3-495, P.O. Box 2812, Denver. Colorado 80201

AMERICAN FEDERATION OF LABOR – CONGRESS OF INDUSTRIAL ORGANIZATIONS, and its COMMITTEE ON POLITICAL EDUCATION, NEW YORK STATE AFL-CIO and PENNSYLVANIA AFL-CIO, 815 16th Street, N.W., Washington, D.C. 20006

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, AFL-CIO and its SYSTEM BOARD OF ADJUSTMENT NO. 451 and LOCALS 3001, 3014 and 3049, 6300 River Road, Rosemont, Illinois 60018

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO and its LOCAL 164, 1200 15th Street, N.W., Washington, D.C. 20005

Respondents (Plaintiffs)

and

NATIONAL RIGHT TO WORK LEGAL DEFENSE AND EDUCATION FOUNDATION, INC., 8316 Arlington Boulevard, Fairfax, Virginia 22030

(continued)

and

NATIONAL RIGHT TO WORK COMMITTEE, 8316
Arlington Boulevard, Fairfax, Virginia 22030

Respondents (Defendants)

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

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March 17, 1977

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[1] The Appendix to this Petition is set forth in a separate volume submitted herewith.

TABLE OF AUTHORITIES

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Respondents (Defendants)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in their consolidated appeals on December 17, 1976. The judgment affirmed two Orders of the United States District Court for the District of Columbia.

Opinions Below

The *per curiam* judgment, without opinion, of the United States Court of Appeals for the District of Columbia Circuit is unreported, as the judgment was issued pursuant to Rule 8(f) of the General Rules of the United States Court of Appeals for the District of Columbia Circuit. This judgment is set forth in the Appendix to this Petition, p. 1a. Likewise, neither of the Orders of the United States District Court for the District of Columbia are reported. Both Orders are set forth in the Appendix, pp. 3a through 5a.

Statement of Jurisdiction

The judgment of the Court of Appeals was entered on December 17, 1976. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Questions Presented

1. May Petitioners be denied intervention of right, as defendants, on the sole ground that they "are adequately represented [by the original defendants] and should not be permitted to intervene as a matter of right" where

(a) their application for intervention fully complied with Rule 24(a) F.R.C.P.

(b) their Answer includes twenty-two affirmative defenses and a counterclaim not encompassed by the Answer of the original defendants;

(c) Petitioners' interests, as employees, are materially and significantly different from those of the original defendants, as employers; and

(d) The District Court, by Order dated January 26, 1976, has taken as established, vis-a-vis the original defendants, critical allegations made by Respondent-Plaintiffs, which allegations are vigorously denied by Petitioners?

2. May Petitioners be denied intervention of right on the sole ground that they are adequately represented by the original Defendants, where Petitioners and the original Defendants are in potential conflict over the production of lists of contributors, which lists the original Defendants (for constitutional reasons, which Petitioners have no right, let alone standing, to invoke)

have actually refused to produce pursuant to Orders of the District Court?

3. Whether, after granting Petitioners limited permissive intervention, thus binding the Petitioners, as parties, to any judgment to be rendered, the Court may strike the Answer, Affirmative Defenses and Counterclaim of the Petitioners without noting any legal insufficiency thereof?

4. Does the striking of Petitioner's Answer violate the due process clause of the Fifth Amendment to the United States Constitution?

Statutes and Rules Involved

This case involves Rule 24, Federal Rules of Civil Procedure (hereinafter Rule 24 F.R.C.P.), and the Labor-Management Reporting and Disclosure Act (hereinafter LMRDA), especially §101(a)(4) [29 U.S.C. §411(a)(4)], §102 [29 U.S.C. §412], §103 [29 U.S.C. §413] and §603 [29 U.S.C. §523] thereof. The specifically enumerated sections of LMRDA, along with Rule 24, F.R.C.P., are set forth in the Appendix, p. 76 *et seq.*

Statement of the Case

The Respondent-Plaintiffs, twelve national and international unions, and the American Federation of Labor-Congress of Industrial Organizations, filed in the United States District Court for the District of Columbia a Second Amended Complaint against the National Right to Work Legal Defense and Education Foundation, Inc. (hereinafter "Foundation") and the

National Right to Work Committee (hereinafter "Committee")[2] requesting in two counts, injunctive and declaratory relief and compensatory damages for alleged violations of the Labor-Management Reporting and Disclosure Act (LMRDA), Sections 101(a)(4) and 203(b) [29 U.S.C. §411(a)(4) and 29 U.S.C. §433(b)]. Jurisdiction of the District Court is claimed under 28 U.S.C. §2201 (declaratory relief), 28 U.S.C. §2202 (relief ancillary to declaratory relief), 29 U.S.C. §412 (relief for persons aggrieved by infringement of their rights under LMRDA), 28 U.S.C. §1331 (Federal questions involving more than $10,000) and 28 U.S.C. §1337 (civil actions arising under Acts of Congress regulating commerce). Count I of the Second Amended Complaint would deny to Petitioners herein their right to receive or continue to receive legal aid from the Foundation, either in the form of money or the services of the Foundation's attorneys.[3]

Petitioners moved to intervene as defendants on January 9, 1976. The District Court denied Petitioners intervention of right, "it appearing . . . that movants are adequately represented. . . ." The District Court, however, did grant Petitioners permissive intervention, "to afford the movants an opportunity to submit evidence on the limited issue of whether the plaintiffs in the law suits set forth in paragraph ten of the amended

---

[2] The Foundation and the Committee are collectively identified herein as the "original defendants." The Complaint was filed on May 1, 1973, the Amended Complaint was filed on May 15, 1973, and the Second Amended Complaint was filed March 9, 1976.

[3] The Committee was founded and functions as an educational and lobbying organization to oppose compulsory unionism; the Foundation provides legal aid to employees whose human and civil rights are abridged by abuses and illegal conduct arising from compulsory unionism.

complaint were at the time of those actions union-member employees, and to submit briefs on the legal question extant. . . ." Subsequently, upon the Motion of the Respondent-Plaintiffs, the District Court dismissed Petitioners' Answer as being "outside the scope of the permissive intervention granted. . . ." Neither the Courts below nor either Respondent ever questioned the sufficiency of Petitioners' "interest", under Rule 24(a)(2) F.R.C.P.

REASONS FOR GRANTING THE WRIT

I.

SPECIAL NATIONAL IMPORTANCE OF THIS CASE.

This case, which has no precedent, involves as plaintiffs the AFL-CIO and twelve International Unions having members and locals throughout the United States. Their complaint is based on an interpretation of the second proviso of 101(a)(4) LMRDA never before urged upon any court. Thus construed, the proviso has consequential ramifications affecting importantly union members, unions, employers, employees and legal-aid organizations.

Petitioners are typical of thousands of employees seeking court enforcement of their constitutional and statutory rights against unions. They are regarded as "dissidents" by union leaders; and are treated accordingly. Contest between such individuals, bereft of legal aid, and powerful, well-financed unions is either impossible or one-sided. That is why they need legal aid.

Defendants, admittedly *employers*, have presented to the Courts below weighty constitutional and statutory arguments. By their dismissed Answer, Intervenor-Petitioners asked consideration of twenty-two different arguments (some statutory and some constitutional) appropriate to their status as *employees*. None of these twenty-two defenses was made by the original parties in this litigation.

The District Court Orders sought to be reviewed have unavoidable adverse impact or repercussions on: all unions, the interpretation of the LMRDA, availability of courts to dissident employees, constitutional and statutory rights of all employees, and all legal-aid organizations which help employees in cases against unions. As precedents, those Orders cripple Rule 24(a) F.R.C.P.; are out of line with precedents of this Court; deny Petitioners, and thousands like them, meaningful intervention and hearing; permit summary dismissal of intervenors' pleadings; create an unprecedented, useless intervention sans hearing and argument, sans duties or rights; and place upon all intervenors the obligation to suffer in silence flagrant abreption of their rights by an entirely novel "equity action," unknown to statute or law.

Section 101(a)(4) LMRDA, on which Respondent-Plaintiffs rely, has repeated, national application to unions and union members, as the relevant legislative and case reports[4] show; and as Respondent-Plaintiffs themselves indicate by listing in their complaint, and deprecating as violative of union rights, twenty-seven cases pending *in other courts*. The Courts below permit

[4] *NLRB v. Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418, 88 S. Ct. 1717, 20 L.Ed.2d 706 (1968); *Ross v. IBEW*, 93 LRRM 2631 (9th Cir. 1976).

circumvention or subversion of that Section by its second proviso, but the underlying complaint does not name any "interested employer" in the twenty-seven listed cases nor in the instant case.

II.

PETITIONERS ARE INADEQUATELY REPRESENTED BY EXISTING PARTIES.

Denial of intervention of right by the District Court on the sole ground of "adequate representation" was erroneous under applicable cases.[5] Once Petitioners met the requirements of substantial interest, and risk of impairment of that interest, then

> petitioners are entitled to intervene as a matter of right *unless* their interest is adequately represented by existing parties. Thus, the use of the term "unless" in the 1966 amendment puts the burden of providing adequacy of representation on the party opposing intervention. [*TPI Corp. v. Merchandise Mart of S. Carolina*, 61 F.R.D., 684 (D.S.C. 1974).]

The Courts below never even suggested that Petitioners lacked the required *interest* nor that the risk of impairment of that interest by the outcome of this litigation was not real. Nor did Respondents' papers below deny such interest or risk.

[5] Trbovich v. United Mine Workers, 404 U.S. 528, 92 S.Ct. 630, 30 L.Ed.2d 686 (1972), Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 87 S.Ct. 932, 17 L.Ed.2d 814 (1976), Smuck v. Hobson, 132 U.S. App. D.C. 372, 408 F.2d 175 (1969), Nuesse v. Camp, 128 U.S. App. D.C. 172, 385 F.2d 694 (1967), Holmes v. Government of Virgin Islands, 61 F.R.D. 3, (D.U.I. 1973).

In their application below, Petitioners carried the minimal burden of showing inadequacy of representation. They pointed out Defendants' inability to provide adequate representation under the five criteria adopted by the District Court on Respondents' proposal — criteria which later became the basis for the District Court's Order of January 26, 1976,[6] and which conclusively disabled Defendants' representation of Petitioners. The latter also submitted below proof of inadequacy of representation by a comparison of Defendants' Answer with Petitioners' Answer, which presented to the Courts below twenty-two valid affirmative defenses not raised by Defendants. Defendants, Petitioners urged below, were *employers*. As such they could not adequately defend the interests of employees like Petitioners. The interests of donees differ from those of donors of legal aid. In a colloquy[7] with Defendants' attorneys four days before denying intervention of right, Judge Richey expressly conceded that the interests of Defendants and Petitioners "may be" in conflict.

[6] See Appendix, page 6a. This Order prevents introduction of evidence by Defendants to counter the very portions of the Second Amended Complaint which Petitioners wish to refute.

[7] On March 4th, 1976, the District Court engaged in the following colloquy with original Defendants' attorney, Thomas Jackson:

* * *

> The Court: Well, I am going to say something that perhaps I shouldn't say, but I can't conceive that your office and Mr. Kilcullen, and Whitney North Seymour, and all of the others that you have had participating in this case are not adequate to represent the interests of the defendants [sic].
>
> Mr. Jackson: We have conflicting interests, Your Honor.
>
> The Court: Well, may be you do.

* * *

Clearly, Petitioners met the burden of showing at least that they "may be" inadequately represented under the *Trbovich* case *supra*, 404 U.S. at 538; and see footnote number ten on that page. The courts have applied a liberal test: whether representation "may be" inadequate.[8]

III.

BALANCING EQUITIES.

The other fundamental interests and equities of the parties to be balanced in a determination of Petitioners' right to intervene are the following:

(a) Petitioners' and others' interests in receiving continued legal aid from the Foundation out-balances Respondent-Plaintiffs' interest in preventing such aid to Petitioners and to all intervenors.

(b) Respondent-Plaintiffs' interest in avoiding the substantial issues raised by Petitioners' Answer is out-balanced by Petitioners' "due process" interest in defending themselves adequately against the necessarily hostile Complaint.

(c) Respondent-Plaintiffs' interests in denying to union members and other employees practical access to courts in suits against unions is out-balanced by Petitioners' and others' interests in instituting or maintaining valid actions against labor unions, and in defending themselves against actions brought by unions against them.

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[8]See Trbovich v. United Mine Workers, supra, Smuck v. Hobson, supra, Nuesse v. Camp, supra, Atlantis Dev. Corp. v. United States, 379 F.2d 818 (5th Cir. 1967), Kozak v. Wells, 278 F.2d 104 (8th Cir. 1960), Ford Motor Co. v. Bisanz Bros., 249 F.2d 22 (8th Cir. 1957), General Motors Corporation v. Burns, 50 F.R.D. 401 (D. Hawaii 1970).

IV.

CONFLICT WITH SECOND CIRCUIT ESTABLISHED.

The Courts below established a nationally significant conflict between the Second Circuit and the District of Columbia Circuit, on the issue of whether the District Court may summarily strike the answer of a permissive intervenor.

The Second Circuit case of *Stewart-Warner Corporation v. Westinghouse Electric Corporation*, 325 F.2d 822 (2nd Cir. 1963), *cert. den.*, 376 U.S. 944, 84 S. Ct. 800, 11 L.Ed.2d 767 (1964), presented that issue. It held that affirmative defenses and counterclaims may be asserted; that the District Court is "without discretion to deny the intervenor [defendant] the opportunity to advance such claims" [325 F.2d at 827]. The net effect of the judgment of the United States Court of Appeals for the District of Columbia Circuit is to grant to the District Court discretion to strike at will Affirmative defenses and counterclaims.[9]

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[9]The striking of the Petitioners' Answer occurred subsequent to the filing of notice of appeal by Petitioners from the March 8, 1976 Order denying them intervention of right and limiting the permissive intervention granted. That appeal deprived the District Court of subject matter jurisdiction over any matter relating to that appeal. Yet the District Court proceeded to strike the Answer of Petitioners without in any way criticizing it. This act of the District Court, affirmed by the Court of Appeals, established a conflict between the District of Columbia Circuit and the Ninth Circuit, per the latter's holding in Ruby v. Secretary of the United States Navy, 365 F.2d 385 (9th Cir. 1966), *cert. denied*, 386 U.S. 1001, 87 S. Ct. 1358, 18 L.Ed.2d 442 (1967).

The facts in the *Stewart-Warner* case are the same as in Petitioners' case. There permissive intervention was granted, the answer (including affirmative defenses and counterclaims) was received. Later a motion to dismiss counterclaims and certain affirmative defenses was granted by the District Court. In the instant case, permissive intervention was granted, with disabling limitations, the Answer to the First Amended Complaint (as filed with the Motion to Intervene) was received by the clerk and placed upon the docket. On the day the token permissive intervention was granted, the Court also granted the Plaintiffs' Motion for Leave to File a Second Amended Complaint. Subsequently, Intervenors' Answer to the Second Amended Complaint was filed with the Clerk of the Court and placed upon the docket. Then, Respondents filed their Motion to Strike, which the District Court granted.[10]

The Second Circuit decision is the only logical result consistent with Fifth Amendment due process. Where, as here, the Court grants intervention which subjects each Petitioner, as a party, to both the jurisdiction of the Court and the outcome of the litigation, the District Court is "without discretion" to deny Petitioners the ability to defend effectively their interests and rights by censoring the substantive matters they may prove or upon which they may submit legal briefs.[11]

[10]The affirmative defenses and counterclaims in both Stewart-Warner and the instant matter were and are inextricably intertwined with the issues raised by the Complaint. Of course, permissive counterclaims are another matter, see Stewart-Warner, supra, at p. 828.

[11]The net result of the limitation and restrictions placed upon the permissive intervention granted and the striking of the Answer of your Petitioners would appear to be to limit the Appellants to those defenses and counterclaims which the original Defendants raised. Petitioners have compiled a comparative presentation of the Complaint, the Answer of the original Defendants and the Answer of the Petitioners herein. This compilation may be found in the Appendix, pp. 9a-75a.

Likewise, the District Court is without discretion to strike a counterclaim, where, as here, a separate cause of action may be filed by the Intervenors against the unions.

V.

DISMISSAL OF PETITIONERS' ANSWER VIOLATED DUE PROCESS UNDER THE FIFTH AMENDMENT.

The disabling permissive intervention allowed to Petitioners by the Courts below binds them under a possible judgment in this case. Yet it leaves them without any voice during the judicial process which produces such a judgment. This Court has condemned such a procedure many times as *Matthews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976) (and the cases cited therein) shows:

> [A]s has been implicit in our prior decisions, e.g.* * * [citing cases] * * * the interest of an individual in continued receipt of * * * benefits is a statutorily created "property" interest protected by the Fifth Amendment. [Citing cases] * * *
>
> This Court consistently has held some form of hearing is required before an individual is finally deprived of a property interest. * * * [citing cases] * * * The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." [Citing cases] * * *. [424 U.S. at 332, 96 S. Ct. at 901-902; 47 L.Ed.2d at 31-32.]

The right of Petitioners and of others similarly situated to receive legal aid and of legal-aid groups to give that aid was recognized long before the second proviso of Section 104(a)(4) LMRDA became law.

Sections 103 and 603 of that statute perpetuate such long-recognized property rights and privileges.[12]

What the Constitution does under the Fourteenth Amendment *vis-vis* the States,[13] it does *a fortiori*, under the Fifth Amendment, to protect due process in federal courts. It is not due process to tell Petitioners that they are entitled to no opportunity to present arguments and evidence to prove their defenses. *Paul v. Davis, supra*, says:

> We think that the italicized language in the last sentence quoted [from *Wisconsin v. Constantineua*, 400 U.S. 433, at 437, 91 S. Ct. 507 at 510, 27 L.Ed.2d 515 at 519 (1971)] "because of what the government is doing to him," referred to the fact that the governmental action taken in that case deprived the individual of a right previously held under state law. . . . [424 U.S. at 708, 96 S. Ct. at 1164, 47 L.Ed.2d at 418.]

In *Paul, supra*, the right to purchase liquor was involved. That right pales in comparison to the right to practicable access to the courts. If the decisions of the District Court to deny intervention of right and to strike the Answer of Petitioners are upheld, the Petitioners will be shorn of a meaningful hearing. This further increases the risk that their right to go to the courts will be impaired.

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[12]See Meyer v. Nebraska, 262, U.S. 390, 399, 43 S. Ct. 625, 626, 67 L.Ed. 1042, 1045 (1923).

[13]Paul v. Davis, 424 U.S. 693, 96 S. Ct. 1155, 47 L.Ed.2d 405 (1976); Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L.Ed.2d 484 (1972); Bell v. Burson, 402 U.S. 535, 91 S. Ct. 1586, 29 L.Ed.2d 90 (1971).

Among Petitioners' twenty-two affirmative defenses, (all of which are set forth in the Appendix, pp. 43a-66a) several of the more important ones, which Petitioners have been barred from presenting, highlight the inherent lack of due process:

(i) No statute or other law authorized the "equity action" set forth in the instant Complaint. In allowing the alleged "equity action," the Court below has patently violated the principles laid down by this Court in *Cort v. Ash*, 422 U.S. 66, 95 S. Ct. 280, 45 L.Ed.2d (1975); *Securities Investor Corporation v. Barbour*, 421 U.S. 412, 95 S. Ct. 1733, 44 L.Ed.2d 263 (1975); and *National R.R. Passenger Corp v. National Association of R.R. Passengers*, 414 U.S. 453, 94 S. Ct. 690, 38 L.Ed.2d 646 (1974), rehearing denied, 415 U.S. 952, 94 S. Ct. 1478, 39 L.Ed.2d 568 (1974).

Nothing in Title I LMRDA intimates a Congressional intent to permit an "equity action," such as the District Court approved. *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, et al. v. National Right to Work Legal Defense and Education Foundation, Inc., et al.*, 336 F. Supp. 46 (D.D.C. 1974). More than seventy times in the legislative history of Section 101(a)(4), members of the Senate and the House of Representatives referred to actions *by union members* against unions. Not one Congressman nor one Senator ever referred to an action *by a union* under that Section. When the two sentences of Section 102 LMRDA are read together, as they must be, they clearly refer (by use of the words "such action") to an action *by a union member* against his union, and not to an action *by a union.*

(ii) The Complaint seeks to prevent Foundation and Committee from giving legal aid upon the sole basis of the second proviso in Section 101(a)(4) LMRDA. But

the *constitutional* rights protected by that Section are not subject to limitation by *statute*. Respondents use that proviso to prevent Petitioners and others from getting before the courts, in violation of the Fifth Amendment of the Constitution. The Complaint contains no *fact* allegation derogating from Foundation's status and function as a genuine legal-aid organization. Paragraph "10" of the Complaint lists and describes twenty-five actions in which the Foundation has given legal aid. Every allegation in the Complaint of purported *fact* (as distinguished from *conclusions of law* or *conclusions of fact*), is protected by the First Amendment. Even Respondents' *conclusions of fact* are legally innocuous, because they refer only to previously alleged items of Defendants' *legitimate* activity by use of phrases like: (i) "in those activities" (referring to the twenty-one legally innocuous allegations previously alleged) and (ii) "in promoting such suits" (referring to the twenty-five lawful suits listed in the Complaint). See *NLRB v. Industrial Union of Marine & Shipbuilding Workers, supra.* Two further illustrations of the necessarily involved lack of due process are set forth in the footnote below.[14]

[14](i) By alleging the existence of other lawsuits, as a predicate to their requested relief, Respondent-Plaintiffs are in effect asking the District Court below to exercise an undefined form of judicial review of twenty-seven actions pending *in other courts.* Respondent-Plaintiffs list these cases in their complaint because of two *conclusions of fact* they allege:

a. "[T]he Foundation (aided by the Committee) has financed, encouraged, managed and participated (other than as a party) in suits . . . by employees and members of labor organizations which challenge their financial obligations to the union which is their collective bargaining representative." Appendix, pp. 30a-31a. Obviously, the merits of those suits must be decided in the courts where the actions are pending. If they are found to be meritorious, why do Respondents complain? If

(continued)

Conclusion

For the reasons set forth hereinabove, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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(footnote continued from preceding page)

not, are they asking the District Court herein to review or re-try them?

b. "In those activities the Foundation has been acting as an agent and conduit for employers interested in promoting such suits. . . ." Appendix, p. 31a. Was this brought out in those suits? If so, what were the rulings by the other Courts? If not, why not? Do Respondents now ask the District Court to open those cases in other courts to "prove" in Washington, D.C. what was relevant to twenty-seven cases in other courts?

Those two *conclusions of fact* imply the unprecedented contention that the District Court should investigate and review these two facets of the twenty-seven *listed* Foundation-aided cases. It is a matter of nationwide importance that Respondent-Plaintiffs' pretention to such unorthodox reivew of litigations pending in other courts by the District Court for the District of Columbia should be checked by this Court.

(ii) The first cause of action set forth in the Complaint adds up to an accusation that the original Defendants are unlawfully interfering in the *internal affairs and disputes* of unions. This "equity action" amounts to assertion of a series of "labor disputes" (between Respondent-Plaintiffs and Respondent-Defendants) within the meaning of the Norris-LaGuardia Act. This fact alone would prevent the District Court from issuing the injunction Respondent-Plaintiffs seek; and it shows that only the N.L.R.B. has jurisdiction over such disputes.

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